

**1.0**

# **INTRODUCTION**

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### 1.1 Background

Salmon and steelhead trout species in Washington, Oregon, and Idaho (Pacific Northwest) and California have been in decline for years. Since 1992, nearly 30 evolutionarily significant units<sup>1</sup> (ESUs) of these species have been listed as threatened or endangered under the Endangered Species Act (ESA).

Section 9 of the ESA imposes take prohibitions on species listed as endangered. However, section 4(d) of the ESA states that whenever a species is listed as threatened, the Secretary “shall issue such regulations as he deems necessary and advisable to provide for the conservation of the species.” Such protective regulations may include any or all of the prohibitions that apply automatically to protect endangered species under ESA section 9(a)(1). Those section 9(a)(1) prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to *take* endangered species (that is, harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as endangered, without written authorization).

Between 1997 and 1999, the National Marine Fisheries Service (NMFS) listed 14 ESUs of salmon and steelhead as threatened under the ESA, but did not immediately invoke the ESA section 4(d) protections (Table 1). In July 2000, NMFS promulgated 4(d) rules for the 14 threatened ESUs accompanied by a set of “limits” on the application of the ESA section 9 take prohibitions provided that the specified categories of activities contribute to conserving listed salmonids (65 FR 42422). This document analyzes the effects of implementing the limit that governs routine road maintenance (RRM) programs (Limit 10).

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<sup>1</sup>For the purposes of fulfilling the mandates of the ESA, NMFS treats ESUs as “species” as the Act defines the term “...including any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature” (16 U.S.C. § 1531-1544).

**Table 1.** The 14 Salmon and Steelhead Evolutionarily Significant Units (ESU) included in the ESA 4(d) Rule and their listing information.

Evolutionarily Significant Unit (ESU)	Listing Status
Puget Sound Chinook Salmon ESU	Listed as a threatened species on March 24, 1999.
Lower Columbia River Chinook Salmon ESU	Listed as a threatened species on March 24, 1999.
Upper Willamette River Chinook Salmon ESU	Listed as a threatened species on March 24, 1999.
Oregon Coast Coho Salmon ESU <sup>2</sup>	Listed as a threatened species on August 10, 1998.
Ozette Lake Sockeye Salmon ESU	Listed as a threatened species on March 25, 1999.
Hood Canal Summer-run Chum Salmon ESU	Listed as a threatened species on March 25, 1999.
Columbia River Chum Salmon ESU	Listed as a threatened species on March 25, 1999.
Upper Willamette River Steelhead ESU	Listed as a threatened species on March 25, 1999.
Middle Columbia River Steelhead ESU	Listed as a threatened species on March 25, 1999.
South-Central California Coast Steelhead ESU	Listed as a threatened species on August 18, 1997.
Central California Coast Steelhead ESU	Listed as a threatened species on March 19, 1998.
SNAKE RIVER BASIN Steelhead ESU	Listed as a threatened species on August 18, 1997.
Lower Columbia River Steelhead ESU	Listed as a threatened species on March 19, 1998.
Central Valley, California Steelhead ESU	Listed as a threatened species on March 19, 1998.

Source: 65 FR 42422.

The NMFS' Northwest and Southwest regions have determined that the section 9 take prohibitions can be invoked with limited exceptions. NMFS, therefore, proposes a mechanism whereby entities can be assured that an activity they are conducting or permitting is consistent with ESA requirements and avoids or minimizes the risk of take of listed threatened salmonids. When such a program contributes to conservation for listed salmonids, NMFS does not find it necessary and advisable to apply ESA section 9(a)(1) take prohibitions to activities governed by those programs. Under such limits to the section 9 take prohibitions, these categories of human activities must contribute to conservation for listed salmonids and their habitat. NMFS anticipates that by involving individuals and entities at the local and state program levels, they

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<sup>2</sup>Oregon coast coho are still listed under the ESA as a result of a December, 2001 Ninth Circuit Court of Appeals decision that stays a September, 2001 District Court ruling that had removed coastal coho of its ESA legal protections (*Alsea Valley Alliance v. Evans*, No. 01-36017 (9<sup>th</sup> Circuit), Order December 14, 2001).

1 would become more engaged with salmon and steelhead conservation while providing NMFS  
2 with additional management tools for conservation of listed salmonids.

3  
4 NMFS sought to design the limit approach to the 4(d) rule to meet the following objectives: 1)  
5 ensuring technical feasibility to yield consistent results in conserving listed species, 2) ensuring  
6 effectiveness over a broad range of activities to contribute to conserving salmon throughout the  
7 Pacific Northwest and California, and 3) developing a user-friendly process to encourage wide  
8 acceptance. With these objectives in mind, NMFS began to establish categories of actions that  
9 could reasonably proceed in a manner that contributes to conservation of listed salmonids,  
10 sought concurrence at the national and local levels, and wrote the 4(d) rule that would explain  
11 the 4(d) limit approach and delineate the means by which the certain categories of actions could  
12 go forward by avoiding or minimizing the risk of take of listed threatened salmonids.

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14 After proposing the 4(d) rule, NMFS held 25 public hearings and attended approximately 100  
15 workshops and meetings with constituents. After examining over 1,500 written comments and  
16 participating in negotiations and informational sessions, NMFS produced the 4(d) rule  
17 comprising 13 (total) limits on the ESA section 9 take prohibitions (65 FR 42422)<sup>3</sup>. The rule  
18 applies to 14 salmon and steelhead ESUs over an area of about 160,000 square miles. As part of  
19 the 4(d) rule, NMFS did not find it necessary to apply the section 9 prohibitions to specified  
20 categories of activities that contribute to conserving listed salmonid or are governed by programs  
21 that adequately limit impacts on listed salmonids. The limits cover activities from fishery  
22 management plans to research programs to habitat restoration activities and, in doing so, create  
23 several new avenues to comply with the ESA. The limits also create a means for NMFS to look  
24 at possible take impacts over broad areas and sets of actions rather than simply accounting for  
25 whether a given activity resulted in direct or indirect take.

26  
27 When the 4(d) rules were first promulgated, NMFS analyzed the 4(d) rule effects on each ESU  
28 in a series of environmental assessments (EAs) under the National Environmental Policy Act  
29 (NEPA) (NMFS 1999a-f). NMFS concluded in the EAs that the rules would not have a  
30 significant effect on the human environment. The public has demonstrated interest in individual  
31 program acceptance under the various 4(d) limits; with increasing interest in using the limits,  
32 there is the possibility of increasing effect. Consequently, it is possible that certain limits on the  
33 ESA section 9 take prohibitions could have some impacts as defined by NEPA. Thus NMFS is  
34 conducting this NEPA analysis to determine what possible effects on the human environment  
35 may occur by implementing Limit 10. Specifically, this EA examines the possible effects of  
36 implementing Limit 10 as another ESA option for analyzing routine road maintenance (RRM)  
37 programs submitted to NMFS under the July 2000 4(d) rule.

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<sup>3</sup>At the same time NMFS adopted a 4(d) rule for Tribal Resource Management Plans (Tribal Plan) which allows American Indian tribes to qualify for a limit on the take prohibition in cases where the Secretary has determined that implementing the Tribal Plan would not appreciably reduce the likelihood that listed species would survive and recover (65 FR 42481). This EA focuses on the 4(d) rule for salmon and steelhead.

Under Limit 10, entities conducting RRM activities (states, cities, counties, ports) would not be subject to the ESA section 9 take prohibitions (with respect to actions implemented under the RRM program) provided that when they perform the RRM actions, they do so using an RRM program that meets the requirements of Limit 10. For NMFS to approve an RRM program, it must clearly define its intended scope and area of impact and operate under the management objectives and performance indicators defined in Limit 10 of the 4(d) rule. That is, an RRM plan must be consistent with the conservation of the listed salmonids' habitat. There are three ways this requirement can be fulfilled: 1) The activity results from RRM activity conducted by Oregon Department of Transportation (ODOT) employees or agents that complies with ODOT's *Transportation Maintenance Management System Water Quality and Habitat Guide* (Appendix A), 2) compliance with a program substantially similar to that contained in the ODOT Guide that is determined to meet or exceed the protections provided by the ODOT Guide, or 3) compliance with a RRM program that meets properly function habitat conditions as described in the 4(d) rule (Appendix B). These various options are discussed in detail in Section 3.0, Alternatives Including the Proposed Action, but regardless of the option, an RRM program must have NMFS' written approval before it can go forward. An RRM program under (10)(i) must describe how it will assure adequate training, tracking, and reporting and describe in detail any dust abatement practices it contemplates. Under (10)(ii), RRM programs must describe how it will assure adequate training, tracking, reporting, and describe in detail any dust abatement practices it requests to be covered. It is important to note that an RRM program approved by NMFS would not authorize RRM activities per se; states, counties, cities, and ports would continue to regulate RRM activities. However, the Limit 10 criteria would offer an entity an additional option for pursuing RRM activities that avoids possible liability under the ESA while providing NMFS with an additional management tool for conserving listed species.

## 1.2 Purpose of Routine Road Maintenance Activities

Limit 10 applies to RRM activities that would be governed by a NMFS approved routine road maintenance program. Under the Limit 10 criteria, a RRM program for a particular area would describe how RRM activities can be carried out consistent with the conservation of the listed salmonid's habitat when it contributes, as does the ODOT Guide, to the attainment and maintenance of properly functioning condition (subsection 3.4, Alternative 2 - Proposed Action). An approved plan must describe acceptable RRM practices that meet the Limit 10 criteria described in the July 2000 4(d) rule. Furthermore, under the Limit 10 criteria, a plan must also describe how it will assure adequate training, tracking, and reporting, and describing in detail any dust abatement practices it requests to be covered. Data from the tracking and reporting programs in both (10)(i) and (10)(ii) will be used to determine whether impacts on threatened ESUs are as predicted or if an altered or strengthened RRM plan is needed.

RRM activities are scheduled or predictable recurring activities that are needed to maintain the functioning integrity of the existing transportation facilities by increasing safely and mobility for customers (ODOT 1999). RRM activities protect public safety, public infrastructure, and the

services necessary for the daily operation of the roadway system. RRM activities can include (among others) patching potholes; sealing roadway cracks; winter operations such as sanding, plowing and anti-icing; painting stripes and stop bars on roadways; maintaining roadsides, stormwater systems, road shoulders, and the roadway prism; mechanical management of noxious weed control; repairing guard rails and fences; cleaning ditches and culverts; cleaning rest areas; lighting and traffic signal systems; and safety patrol for roadside debris. RRM activities and plans would not include construction of new facilities. In carrying out these activities, road maintenance personnel use best management practices, which are physical, structural, and managerial practices designed so that when they are used (singly or in combination) they reduce the activities' impacts on water and habitat. The ODOT Guide (Appendix A) provides a set of road maintenance policies and practices that meets the dual goals of contributing to the conservation of ESA listed species, while meeting critical roadway safety and maintenance needs.

### 1.3 Programmatic EA Review

With respect to the implementation of the 4(d) rule Limit 10 and any RRM programs that might be submitted under that limit, NMFS is using a staged or sequential approach in its NEPA reviews. The first stage is this EA, which assesses the environmental impacts associated with the implementation of Limit 10. This is a programmatic EA that will form the basis for subsequent NEPA analyses.

Because the Proposed Action would set up an *optional process* for various entities to operate their RRM programs, its effects are necessarily programmatic in nature. In other words, the only effects that Proposed Action may generate are those associated with putting take prohibitions into place and establishing the Limit 10 option under which states, counties, cities, and ports may seek NMFS' approval of RRM programs. The Proposed Action does not address the possible effects of *individual* RRM programs because the actual physical effects associated with those programs cannot be predicted at this point (it is impossible to anticipate what programs will be submitted to NMFS or approved). During the second stage of review, NMFS will conduct further sequential NEPA analyses when an RRM program is submitted to NMFS for approval based on compliance with Limit 10 criteria (subsection 3.4, Alternative 2 - Proposed Action).

These subsequent NEPA documents will present a summary of the issues addressed in this programmatic Limit 10 EA and, as appropriate, incorporate by reference the analyses presented in this programmatic EA. The second stage analyses will address any environmental effects of NMFS' action regarding a specific RRM program.